

No. 78-315

Supreme Court, U. S.

FILED

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WILLIAM BODAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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PHILLIP L. NEAVEILL, PETITIONER

*v.*

LUDWIG ANDOLSEK, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT

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MEMORANDUM FOR THE RESPONDENTS  
IN OPPOSITION

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WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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Petitioner seeks review of his dismissal from the United States Postal Service for conduct unbecoming a Security Police Officer. He argues that the dismissal cannot reasonably be said to promote the efficiency of the service and that the penalty of dismissal was so severe as to be arbitrary and capricious.

1. Petitioner was a Security Police Officer (SPO) with the United States Postal Service from 1972 to 1975 (Pet. App. 14a). He was discharged effective October 25, 1975, for engaging in "conduct unbecoming a Security Police Officer" during a convention in Nashville, Tennessee, on August 14 and 15, 1975 (Pet. App. 14a-15a). He appealed the decision to discharge him to the Federal Employees Appeals Authority of the Civil Service Commission and was granted an administrative hearing. Witnesses testified at the hearing that, contrary to agency regulations, petitioner had carried a concealed weapon on two occasions during the convention; that he was intoxicated and had to be forcibly disarmed by police officers; and that petitioner had falsely represented to police that he was a Postal Inspector (Pet. App. 16a). The administrative law judge upheld the decision of the Postal Service, finding that the charges of conduct unbecoming an SPO and impersonating a Postal Inspector had been substantiated. Further, the ALJ reviewed the agency's stated reasons for removal and petitioner's evidence as to agency decisions in other disciplinary actions and rejected petitioner's claims that discharge was too harsh a penalty in this case. The Appeals Review Board of the Civil Service Commission denied petitioner's request to reconsider the decision of the ALJ (Pet. App. 15a).

Petitioner then sought review in the district court, arguing again that the record did not support a finding that his removal would contribute to the efficiency of the service and that the decision to remove him was

arbitrary and capricious. The district court reviewed the administrative record in detail and concluded that "there is a rational basis which supports the removal of the plaintiff from the Postal Service in accordance with all the proper disciplinary procedures and appeals" (Pet. App. 18a).

The decision of the district court was affirmed by the court of appeals in open court. Later, in an unpublished order, the court expressly upheld the district court's determination that there was a rational basis for the agency's decision to dismiss petitioner. The court referred to its recent decision in *Young v. Hampton*, 568 F.2d 1253, 1257 (7th Cir. 1977), in which it had ruled that in order to decide that a rational basis exists for an agency action the court must find both that the individual actually committed the acts charged and that the disciplinary action would promote the efficiency of the service. The court stated (Pet. App. 19a):

This is one of the cases referred to in *Young* where the circumstances underlying the dismissal make it readily appear that retention of the employee can rationally be found to have an adverse effect on the efficiency of the service. The agency's choice of discharge was not so disproportionate to the conduct involved as to be arbitrary or capricious.

2. In any event, the case presents no question appropriate for consideration in this Court. The district court correctly limited its review to an examina-

tion of the administrative record to determine whether the agency's action had a rational basis. *Wood v. United States Post Office Department*, 472 F.2d 96, 99 (7th Cir.), cert. denied, 412 U.S. 939 (1973). Petitioner is now merely restating factual arguments which were unsuccessful in the hearings below; there is no reason for further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

OCTOBER 1978